in land that may enter a caveat against the land but also any person claiming title to or any registrable interest in any alienated land or even claiming only a right to such title or registrable interest, who may enter a caveat.

As I see it, Katlyn has discharged the onus placed on it to establish that the caveat should remain pending disposal of the main issue, namely, who is the true and rightful owner of the land in question. As I see it, there should be a trial to ascertain whether or not Katlyn paid Suppiah for the land. It also has to be judicially determined whether the writ in Suppiah's case was duly served on Katlyn. If the writ was not duly served, it would seem that all proceedings in the suit subsequent to the issue of the writ are open to question and liable to be set aside.

Ker claims to be a purchaser of the land in good faith and for valuable consideration and invokes the provisions of s 340 of the Code. At this stage I do not know whether he is such a purchaser. The court record discloses that the auction was held on 14 July 1988 when Ker paid the auctioneer a sum of $20,050 being 10% of the purchase price, as he was required to under the memorandum of contract he executed consequent upon having successfully bid at the auction. He paid the balance purchase price of $180,450 on 23 July 1988 although under the contract he had one month within which to pay the same. The registrar's certificate of sale was issued to Ker on 3 August 1988. On 22 September 1988, there was deducted from the purchase price a sum of $2,050 being the court's commission and a further sum of $1,510 being the auctioneer's charges leaving a balance sum of $196,985 which was paid to Suppiah's solicitors on 27 September 1988. It is not known whether the solicitors have paid Suppiah or retained the money pending determination of all the matters raised by Katlyn. It is not known when exactly Ker consulted his solicitors. The court record in Originating Summons No 31-423 of 1988 discloses a letter dated 6 October 1988 to our senior assistant registrar enclosing the originating summons wherein Ker sought an order for delivery of the title to him. A period of over two months had lapsed since the issue of the certificate of sale. How is it that Ker paid the balance purchase price so promptly and yet allowed more than two months to pass before taking court action to obtain the title? Did he deliberately wait for the purchase price to be paid to Suppiah's solicitors and if so why? Is it more than a coincidence that his lawyers and Suppiah's were the same? Katlyn had no inkling of Suppiah's action, right up to the completed auction sale. Yet there was no difficulty in getting them to produce the title. Was Katlyn deliberately kept in the dark until everything was over and their land well and truly sold? Truly sold? If so, did Ker have notice of this or was he innocent of the whole thing? Should he have taken earlier steps to obtain registration of the title in his name and on discovering that Katlyn was objecting, at once alerted the registrar and stopped payment to Suppiah? I do not know. What I know is that many questions need to be asked and indeed answered. It seems to me there should be a trial in this regard.

Accordingly, the application for removal of the caveat must be and is hereby dismissed with costs to be taxed.

Application dismissed.

Solicitors: *C Subbayah & Associates; Leng & Co.*

Reported by *Wong Kim Fatt*

Lee Chee & Ors v Allen & Gledhill

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S6-24-468-89
LIM BENG CHOON J
22 JANUARY 1990

Legal Profession — Letter of undertaking — Breach of — Whether court has jurisdiction to entertain application for solicitors' alleged breach of undertaking

The plaintiffs entered into joint-venture agreements with the defendants' clients to develop certain lands of which the plaintiffs were registered owners. The plaintiffs deposited documents of title to the lands with the defendants, on receipt of which the defendants gave a letter of undertaking to the solicitors for the plaintiffs. The letter of undertaking was dated 7 August 1985 and contained an undertaking by the defendants to furnish the plaintiffs with performance guarantees in connection with the joint-venture agreements, failing which the documents of title to the lands were to be returned. No bank performance guarantee was furnished and the documents of title were not returned to the plaintiffs. A search carried out by the defendants showed that the lands had been transferred to the developers before the letter of undertaking had been given by the defendants and that the lands had been charged by the developers to secure a loan. The defendants alleged that the plaintiffs had by their actions disabled themselves from returning to the plaintiffs the document of title. The plaintiffs commenced an action seeking a declaration that the defendants were in breach of the letter of undertaking dated 7 August 1985. It was argued for the defendants that the proceedings constituted by the plaintiffs were improper because:

(a) The court had no jurisdiction over advocates and solicitors in the States of Malaya as advocates and solicitors are not officers of the court whereas in England solicitors are officers of the court as provided in s 50 of the Solicitors Act 1957 of England.

(b) There was no such similar provisions in the Legal Profession Act 1976. The High Court in England exercise supervisory control over solicitors in relation to their role as solicitors on account of the fact that solicitors are officers of the court in England.

(c) In the States of Malaya, the professional conduct of advocates and solicitors are under the supervisory control of the Bar Council having regard to the provisions of the Legal Profession Act 1976.

Held, allowing the plaintiff's application

(1) The plaintiffs were seeking a declaration that the defendants were in breach of its undertaking and the remedies sought were to vindicate their legal rights. The cause of action was the breach committed by the defendants which caused the plaintiffs to suffer loss and was not grounded on any misconduct or malpractice by the plaintiffs. The function of the court to entertain an application to enforce a plaintiff's legal right was absolute.

(2) The partners and legal assistants of the defendants were not officers of the court within the context of the principle laid down by the English courts, and the court had no disciplinary jurisdiction over them in their capacity as officers of the court. If the undertaking had been given to the plaintiffs in respect of any litigation proceeding, then the court had jurisdiction to admonish or penalize the defendant. On the other hand, if the complaints of the plaintiffs were directed to any misconduct, malpractice or dishonesty in connection with the defendants' practice as an advocate and solicitor, the plaintiffs must refer their complaints to the Bar Council as the court had no jurisdiction to entertain such complaints.

Cases referred to

1 *Rediffusion (Hong Kong) Ltd* v *A-G of Hong Kong* [1970] AC 1136 (refd)
2 *Re HA Grey* [1892] 2 QB 440 (not folld)
3 *Karpal Singh* v *Atip bin Ali* [1987] 1 MLJ 291 (distd)
4 *Myers* v *Elman* [1939] 4 All ER 484 (refd)
5 *Re A Solicitor, ex p Hales* [1907] 2 KB 539 (refd)
6 *Damodaran* v *Choe Kuan Him* [1980] AC 497; [1979] 2 MLJ 267 (refd)

Legislation referred to

Legal Profession Act 1976
Solicitors Act 1957 [UK] s 50
Supreme Court of Judicature (Consolidation) Act 1925 [UK] s 215

YM Raja Aziz and *YC Yong* for the plaintiffs.
Chin Yew Meng for the defendant.

Cur Adv Vult

Lim Beng Choon J: On 9 March 1989, one Lee Chee and 15 others, the plaintiffs, instituted this action by originating summons, against Allen & Gledhill, the defendants, seeking a declaration that the defendants are in breach of the letter of undertaking dated 7 August 1985 and an order that the defendants do comply with the said undertaking by furnishing the plaintiffs the performance guarantee as stated in the said undertaking. Alternatively, the plaintiffs are seeking for an order that the defendants do pay them the sum of $11,166,000 as damages in substitution of the performance guarantee. Their application is supported by a joint affidavit affirmed by all the 16 plaintiffs (see encl 2).

The defendants, with leave of the court, entered a conditional appearance and their memorandum of conditional appearance was filed on 11 March 1989. On 20 March 1989, the defendants applied by way of summons-in-chambers to set aside the issuance and the service of plaintiffs' originating summons on the ground that this court has no jurisdiction to entertain the matters raised in the plaintiffs' summons. For convenience I shall refer to the defendants' application as the jurisdictional summons.

To be able to appreciate the jurisdictional issue raised by the defendants, it is necessary to summarize briefly the facts elicited from the plaintiffs' joint affidavit. In this connection, it is not necessary to do more than to state so much of the facts that are relevant to deal with the jurisdictional summons. The plaintiffs were and I suppose still are the registered owners of the respective pieces of lands mentioned in their joint affidavit. They had individually and separately entered into joint-venture agreements with Milventure Selatan Sdn Bhd; Milventure Tengah Sdn Bhd and Milventure Holdings Sdn Bhd (collectively referred to as 'the developers') to develop their respective lands sometime between the year 1981 and the year 1985. The terms of the agreements are identical.

By the joint-venture agreements, the plaintiffs agreed to allow the developers to develop their lands which are contiguous to each other forming a parcel of land suitable for housing development and in consideration thereof the developers agreed to deliver to the plaintiffs 62 units of double-storey houses each of which had been quantified at $80,000 and 124 units of single-storey houses each of which had been quantified at $50,000.

The joint-venture agreements also provide, inter alia, that the developers would furnish a bank performance guarantee whereby the bank would agree to the due performance of the join-venture agreements by the developers. Should the developer fail to build, complete and deliver any or all of the said houses referred to in the joint venture agreements, then the bank, as guarantor, would pay to the plaintiffs for every single-storey house not completed and deliver a sum of $50,000 and likewise for each incomplete and undelivered double-storey house the bank would pay $80,000.

Sometime in July or August 1984, the developers requested the plaintiffs for the release of the issue documents of title to the lands in order that the developer could show them to their bankers for the issuance of the requisite bank performance guarantees. The said titles were duly deposited with the defendants who were acting as solicitors for the developers. Upon the receipt of the said titles, the defendants gave a letter of undertaking to the solicitors for the plaintiffs. The letter of undertaking was dated 7 August 1985 and it reads:

Dear Sirs,

Re: Land held under CT nos
18167 lot no 2305
18168 lot no 2306
18169 lot no 2307
18170 lot no 2308
18171 lot no 2309

18172 lot no 2310
20600 lot no 2328
20601 lot no 2829
18163 lot no 1292
18165 lot no 1501
EMR 4302 lot no 1257

We refer to the above matter and hereby undertake to furnish to all the landowners concerned represented by you with performance guarantees required under cl 6.1 of your clients' joint - venture agreements with Milventure Holdings Sdn Bhd, Milventure Selatan Sdn Bhd and Milventure Tengah Sdn Bhd (in the manner as set out in the enclosed specimen guarantee) within fourteen (14) days from the date hereof, failing which, we undertake to forthwith return to your clients all the relevant original issue documents of title in respect of the above-mentioned properties without any encumbrances whatsoever by the financial institution providing the abovesaid performance guarantees.

We further undertake to forthwhile return to your clients all the abovesaid issue documents of title duly registered in the names of the individual landowners concerned save and except Lor Keng, deceased together with registrable transfers thereto.

Apparently, the developers' attempts to find a suitable banker who would be willing to issue the bank performance guarantee were not successful. There were some negotiations but nothing came out of them. In the result, the plaintiffs thereupon alleged that the defendants were in breach of their undertaking and they demanded the return of the issue documents of title in respect of the lands. Before instituting the present action, the solicitors for the plaintiffs caused a search to be made with the relevant Land Registry. As a result of the search it was found that:

(a) the lands were transferred to the developers on 8 and 10 August 1985, ie a day after the date of the undertaking given by the defendants;
(b) the lands were charged by the developers to Malayan United Bank on 10 August 1985 to secure a loan of $20m granted by the said bank to Seberang Securities Sdn Bhd.

Under the circumstances, the plaintiffs now say that the defendants have by their actions disabled themselves from returning to the plaintiffs the issue documents of title in accordance with the undertaking given by them. Hence this action.

The defendants have also filed an affidavit in support (encl 10) of their jurisdictional summons. The affidavit was affirmed by one of the partners of the defendants' firm. It is averred therein that the proceedings instituted by the plaintiffs are improper because:

(a) This honourable court has no jurisdiction over advocates and solicitors in the States of Malaya as advocates and solicitors are not officers of the court whereas in England solicitors are officers of the court as provided in s 50 of the Solicitors Act 1957 of England.
(b) There is no such similar provisions in the Legal Profession Act 1976. The High Court in England exercise supervisory control over solicitors in relation to their role as solicitors on account of the fact that solicitors are officers of the court in England.
(c) In the States of Malaya, the professional conduct of advocates and solicitors are under the supervisory control of the Bar Council having regard to the provisions of the Legal Profession Act 1976.

Before I proceed any further, it is appropriate at this stage to remind myself that for purposes of the jurisdictional summons I must consider the nature of the declaration sought and I must assume that if the action were allowed to proceed the plaintiffs would be able to establish that the defendants did give the undertaking as suggested by them and that the defendants were in breach of the said undertaking — see *Redifussion (Hong Kong) Ltd* v *A-G of Hong Kong* at p 1154. I must also bear in mind the following words of Lord Diplock in the *Redifussion* case[1] appearing at p 1152:

> Since the lack of jurisdiction has the consequence that the court has no right to enter upon the inquiry as to whether there exists a state of facts which would entitle the courts to grant to the plaintiffs the relief sought, the jurisdiction summons can succeed only if it is shown that, no matter what were the facts that the plaintiffs would be able to establish relating to the subject-matter of the dispute, viz the passing of a Bill in the Legislative Council of Hong Kong, the court would have no power to grant relief of the kind sought agaist the defendants.

At the hearing of the jurisdictional summons of the defendants, counsel for the defendants had furnished me with a rather long written submission together with a bundle of authorities. Counsel for the plaintiffs made an oral submission but he too furnished me with a bundle of authorities. I have considered their respective submissions with great care and I have also perused the authorities furnished by them. I do not propose to reproduce their respective submissions at length in this judgment except where they are pertinent to the propositions contained in my judgment. I do so not because I have no respect for their submissions but because I feel that I am able to deal with all the points raised by them in this judgment without the need to repeat their submissions. I shall of course touch on some of the points raised in their submissions where it is necessary to do so.

To appreciate the points raised by counsel for the defendants, it may be helpful to trace breifly the evolution of the concept that solicitors in England are deemed to be officers of the court. The Supreme Court of England, as it is known today, was brought into being by the Supreme Court of Judicature Act 1873. This and a number of subsequent enactments have been substantially replaced by the Supreme Court of Judicature (Consolidation) Act 1925. This (Consolidation) Act 1925 is a comprehensive code, constituting the Court of Appeal and the High Court of Justice, which comprise the Supreme Court of

Judicature, prescribing the qualifications, tenure of office and salaries of judges and their number and appointment, defining the jurisdiction of the High Court and the Court of Appeal and making provisions regarding officers of the Supreme Court and funds and fees. For purposes of determining the jurisdictional summons, it is sufficient to note that s 215 of this (Consolidation) Act 1925 provided:

> Provisions as to solicitors — (1) Any person duly admitted as a solicitor of the Supreme Court shall be an officer of the Court, and the High Court and the Court of Appeal respectively, or any Division or judge thereof, may exercise the same jurisdiction in respect of solicitors as any one of Her late Majesty's superior courts of law or equity might formerly have exercised in respect of any solicitors, attorney or proctor admitted to practise therein.

That section was repealed and replaced by the Solicitors Act 1932 which was in turn repealed and replaced by the Solicitors Act 1957. Section 50 of the 1957 Act provides:

> Jurisdiction of Supreme Court over solicitors
>
> (1) Any person duly admitted as a solicitor shall be an officer of the Supreme Court: Provided that section one hundred and twenty of the Supreme Court of Judicature (Consolidation) Act 1925 (which imposes on officers of the Supreme Court restrictions as to practice as solicitors) shall not apply to any solicitor by virtue only of this subsection.
>
> (2) Subject to the provisions of this Act, the High Court and the Court of Appeal respectively, or any division or judge thereof, may exercise the same jurisdiction in respect of solicitors as any one of the superior courts of law or equity from which the Supreme Court of Judicature was constituted might have exercised immediately before the passing of the Supreme Court of Judicature Act 1873, in respect of any solicitor, attorney or proctor admitted to practice therein.

It is therefore worthy to note that as an English solicitor is an officer of the court as provided by statute and as the court has jurisdiction in respect of a solicitor, the English courts have laid down the principle that 'the court has a punitive and disciplinary jurisdiction over solicitors, which is exercised, not for the purpose of enforcing legal rights but for the purpose of enforcing honourable conduct *on the part of the court's own officers*' — see *Re HA Grey*[2] at p 443 (emphasis is mine).

The position of advocates and solicitors in West Malaysia is governed by the Legal Profession Act 1976. It is useful to examine this Act to see whether advocates and solicitors here can be deemed to be officers of the court. There are clearly no provisions indicating that they are officers of the court. However that may be, since our courts have sometimes referred to advocates and solicitors as officers of the court, it is desirable to scrutinize some of the provisions of the Legal Profession Act 1976 ('the Act') to see whether such a concept can be implied therefrom.

The right of an advocate and solicitor is provided in s 35 which says:

> Any advocate and solicitor shall, subject to this Act and any other written law, have the exclusive right to appear and plead in all Courts of Justice in Malaysia according to the law in force in those Courts; and as between themselves shall have the rights and privileges without differentiation.

Under s 43, every advocate and solicitor automatically becomes a member of the Malaysian Bar.

For purposes of determining the jurisdictional summons, there are two pertinent parts of the Act that need to be considered. First, there is Part VI which is enacted under the title of Professional Practice, Etiquette, Conduct and Discipline of Advocate and Solicitor and Clerks. Section 77 thereof empowers the Bar Council (established under s 47 of Act 166) with the approval of the Attorney General (not the Chief Justice), to make rules for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors. Section 88 thereof provides, inter alia, that the Bar Council may, if it has reason to believe that an advocate and solicitor or the clerk or servant of such advocate and solicitor has been guilty of dishonesty in connection with that advocate and solicitor's practice as an advocate and solicitor, issue a certificate to that effect and thereupon the Bar Council can by notice take over control of the documents and moneys of the recalcitrant advocate and solicitor pursuant to the Schedule to the Act, subject to the right of the said advocate and solicitor to apply to the High Court for an order directing the Bar Council to return the documents to him and to revoke any notice issued by the Bar Council. Finally, we have s 88A which empowers, inter alia, that the Bar Council may apply to the Chief Justice by an ex parte summons for an order to suspend an advocate and solicitor in respect of whom a complaint has been made to the Bar Council concerning any dishonest act or acts committed by him as an advocate and solicitor. The order of suspension can only be made by the Chief Justice if he is satisfied that such advocate and solicitor should be suspended from practice. It may be thought that this provision suggests that an advocate and solicitor is an officer of the court since the Chief Justice can order his suspension from practice. Such thinking is incorrect because the Chief Justice cannot under s 88A, on his own motion, suspend an advocate and solicitor from practising. The recommendation, if I may use the word, must come from the Bar Council and the Chief Justice is only required to direct his judicial mind to the case to ensure that justice is done.

The second part of the Act pertinent to the jurisdictional summons is Part VII entitled Disciplinary Proceedings. Section 93 thereof makes all advocates and solicitors subject to the control of the Bar Council, and not the court. The Bar Council is also empowered to remove an advocate and solicitor from the Roll or suspend him from practice or censure him if it is satisfied, among other things, that the advocate and solicitor has been guilty of

dishonesty or fraudulent conduct or conduct otherwise unbefitting that of an advocate and solicitor or that the advocate and solicitor has done some other act which, if done by a barrister or solicitor in England, would render him liable to be disbarred or removed from the Roll or suspended from practice or censured. Any complaint of misconduct on the part of an advocate or solicitor must in the first place be made to the Bar Council. It is interesting to note that the court or any judge is also directed under s 95 of Part VII to refer to the Bar Council any matter touching upon the conduct of an advocate and solicitor *in his professional capacity*. This provision suggests that the court or a judge cannot deal with any complaint concerning misconduct of an advocate and solicitor which misconduct relates to his profession occurring outside the court. I am not saying that the court or a judge cannot deal at all with any kind of misconduct of an advocate and solicitor. If the misconduct is related to court proceedings or the conducting of a trial, it cannot be gainsaid that the recalcitrant advocate and solicitor is answerable to the court or a judge. I shall have more to say on this point. Investigation into a complaint about the misconduct of an advocate and solicitor has to be carried out by the Inquiry Committee of the Bar Council or State Bar Committee. On completion of the investigation and if the Bar Council be of the opinion that disciplinary action should be taken against the recalcitrant advocate and solicitor, it would have to apply to the Chief Justice pursuant to s 98(b) to appoint a disciplinary committee to conduct a formal inquiry into the complaint. The disciplinary committee is empowered to impose the stipulated punishments under s 101 against the recalcitrant advocate and solicitor, subject to his right of appeal to the High Court against the punishment imposed on him.

From the above examination of the several sections of the Act, I have no doubt that the principle laid down in *Re HA Grey*[2] cited earlier that the court has a punitive and disciplinary jurisdiction over solicitors who are officers of the court is inapplicable in West Malaysia. Apart from the fact that there is no statutory provision declaring that an advocate and solicitor is an officer of the court, the provisions of the Act clearly show that on matters of professional practice, etiquette, conduct and discipline of advocates and solicitors, the Bar Council is enjoined by law to regulate such matters. Furthermore, the Malaysian Bar is empowered under s 80 to set up a compensation fund to which all advocates and solicitors have to contribute a sum of money annually to be determined by the Bar Council. One of the purposes for setting up such a fund is to relieve or mitigate any loss sustained by any person in consequence of dishonesty on the part of an advocate and solicitor in connection with that advocate and solicitor's practice. I do not mean, as can be seen later, that the only remedy available to the plaintiffs in the present case is to lodge a complaint to the Bar Council and apply for compensation from the compensation fund. The point I am trying to make is that any complaint of misconduct and malpractice on the part of an advocate and solicitor in connection with that advocate and solicitor's practice must be, by virtue of the several provisions of Act 166 herein discussed, directed to the Bar Council which is the proper body to deal with such complaint. The English common law principle advocating that the court has punitive and disciplinary jurisdiction over solicitors is dehors the provisions of Act 166. It is true that our courts have often used the expression that advocates and solicitors are officers of the court. Thus in *Karpal Singh* v *Atip bin Ali*,[3] Seah SCJ said at p 292:

> The first thing to remember is that an advocate and solicitor is an officer of the court and that his professional conduct is always under the supervision and scrutiny of the court. It follows that when there is dereliction of duty on the part of an advocate and solicitor in the conduct of his professional work the court may, in a proper case, order him to be personally liable for the costs of the proceedings after giving him an opportunity to defend himself.

In that case, it is to be noted that the question before the Supreme Court was whether the court could order the costs of an action commenced by the plaintiff which had been struck out to be borne personally by counsel for that plaintiff. The ratio decidendi of that case is that as the action was 'conspicuously unmaintainable' and as the explanation given by the lawyer for the plaintiff was totally unacceptable, the Supreme Court therefore held that the trial judge was wrong in not ordering costs to be borne by the plaintiff's lawyer personally. The opening passage of the judgment is therefore obiter and it was made not within the context of the principle advocated by the English courts as discussed above. It is a warning to advocates and solicitors that if their misconduct or malpractice relates to any proceedings in court or to the conduct of a trial in court, they are always subject to the jurisdiction of the court to punish them. The punishments may take the form of attachment, committal or penalizing them personally with costs. The words 'an officer of the court' is used merely to remind advocates and solicitors that they have an important part to perform in the judicial system and that inasmuch as it is the function of the court to uphold the cause of justice, they too should conduct themselves to ensure justice is done. The jurisdiction of the court to punish the misconduct or malpractice of an advocate and solicitor relating to proceedings in court is well illustrated in *Myers* v *Elman*[4] where Lord Atkins said at p 497.

> From time immemorial, judges have exercised over solicitors, using the phrase in its now extended form, a disciplinary jurisdiction is cases of misconduct. At times the misconduct is associated with the conduct of litigation proceeding in the court itself. Rules are disobeyed, false statements are made to the court or to the parties by which the course of justice is either perverted or delayed. The duty owed to the court to conduct litigation before it with due propriety is owed by the

> solicitors for the respective parties, whether they be carrying on the profession alone or as a firm. They cannot evade the consequences of breach of duty by showing that the performance of the particular duty of which breach is alleged was delegated by them to a clerk. Such delegation is inevitable, and there is no one in the profession, whether in practice or as a judge, who will not bear ungrudging tribute to the efficiency and integrity with which, in general, managing clerks, whether admitted or unadmitted, perform their duties. The machinery of justice would not work without them. Nevertheless, as far as the interests of the court and the other litigants are concerned, it is a matter of no moment whether the work is actually done by the solicitor on the record or by his servant or agent. If the court is deceived or the litigant is improperly delayed or put to unnecessary expense, the solicitor on record will be held responsible, and will be admonished or visited with such pecuniary penalty as the court thinks necessary, in the circumstances of the case.

In the present case, had the undertaking been given to the plaintiffs in respect of any litigation proceeding then there is no doubt that the court has jurisdiction to admonish or penalize the defendants. On the other hand, had the complaints of the plaintiffs been directed to any misconduct, malpractice or dishonesty in connection with the defendants' practice as an advocate and solicitor, the plaintiffs must refer their complaints to the Bar Council as the court has no jurisdiction to entertain such complaints and it is also not the proper forum to deal with the same. In the premises, I agree that the defendants are right in contending that the partners and the legal assistants of the defendants' firm are not officers of the court within the context of the principle laid down by the English courts and the court has no disciplinary jurisdiction over them in their capacity as officers of the court.

The matter, however, does not end here. In this action the plaintiffs are asking for a declaration that the defendants are in breach of the undertaking given by them on 7 August 1985 and requesting this court to direct that the defendants should comply with the terms of their undertaking failing which they should pay damages in substitute of the performance of their undertaking. The remedies sought by them are to vindicate their legal rights. The function of the court to entertain an application by anyone to enforce his legal right is absolute. Likewise, when the misconduct or malpractice of an advocate and solicitor amounts to a criminal offence and a charge against him is initiated, it is within the jurisdiction of the court to put him on trial. The present complaints of the plaintiffs made to this court are distinct from any complaint of misconduct or malpractice of an advocate and solicitor which is not associated with a litigation proceeding in the court. Here, the plaintiffs are saying that they have been given an undertaking by the defendants. On the strength of that undertaking, they had parted with the issue documents of title. The defendants were in breach of the undertaking. Now they want the defendants to carry out their part of their bargain failing which they say they are entitled to damages. The forefront of their cause of action is the breach committed by the defendants which caused the plaintiffs to suffer loss. They are not concerned as to whether the failure to comply with the undertaking is due to any misconduct or malpractice on the part of the defendants. At any rate their cause of action is not grounded on any such misconduct or malpractice. The jurisdiction of the court to entertain a plaintiff's application for reliefs to vindicate their legal rights is exemplified in a number of authorities. I need only mention three of such cases.

In *Re HA Grey*,[2] Lord Esher MR clearly said that the power of the court to impose punitive and disciplinary jurisdiction over solicitors, as being officers of the court was quite distinct from any legal rights or remedies of the parties. This proposition is followed in the case of *Re A Solicitor, ex p Hales*.[5] In that case, the appellant Hales had acted as solicitor for one Fournet and the appellant had a claim against Fournet for work done as his solicitor. Fournet was an undischarged bankrupt and he decided to tax the appellant's bills of costs. To this the appellant objected on the ground that as an undischarged bankrupt Fournet had no intention to pay the costs. Thereupon Fournet deposited some money with the respondent, the solicitors who were acting for him in the taxation proceeding. The respondents accordingly sent a letter to the appellant informing him of the deposit made by Fournet and also indicating to him that on the completion of the taxation the respondent would be in a position to pay the appellant the amount certified by the taxing master. Upon completion of the taxation proceeding, the taxing master certified that a certain sum was due to the appellant. The respondent refused to pay the certified amount on the ground that they were making a claim against Fournet's estate (Fournet had died before the taxation was completed) and that they intended to hold the money deposited by Fournet to pay themselves. The appellant thereupon took out summons to compel the respondents to pay him the taxed costs. In finding for the appellant, Darling J, approving the principle laid down in the *Re Grey* case,[2] said at p 544:

> The solicitor in this case is in a situation which presents two aspects, involving a double responsibility. He was a debtor, who owed a legal debt. He also owed a duty to his profession, and to the court of justice whose officer he was, to pay over the money which belonged to his client, and of which he had possession through the confidence placed in him in his professional capacity, and as an officer of the court. There are in such a case two wholly distinct rights, the right of the client at law to be paid his debt, and his right to apply to the court as a person whose confidence has been abused by a person who is an officer of the court, and whom he would not have trusted unless he had been such an officer.

In *Damodaran* v *Choe Kuan Him*,[6] the Privy Council ruled that where the terms of a solicitor's undertaking are clear, unqualified and unequivocal, it is the court's duty to order

the solicitor to comply with his undertaking. The following passage of the judgment is relevant:

> The terms of the solicitor's undertaking are clear, unqualified and unequivocal. The event on the happening of which the money was to be paid took place on 16 April 1974, when the transfer of the lands was 'duly registered in the name of the purchaser Messrs Syarikat Alor Merah Sdn Bhd'. The failure to pay the balance of $182,200 is, on the face of it, a plain breach of the undertaking. There would seem to be no reason why in the instant proceedings, commenced on 30 July 1974, by originating summons against the solicitor to enforce the undertaking, the vendor should not recover judgment for the balance of $182,200 with interest from 16 April 1974.

As stated in the *Rediffusion* case,[1] at this stage I am entitled to presume that the plaintiffs would be able to establish that the defendants did give the undertaking and that they had breached the undertakings, thereby causing the plaintiffs to suffer loss. They are therefore entitled to come to this court for the reliefs sought by them.

For the reasons stated above, I hold that this court has jurisdiction to entertain the application made by the plaintiffs. The jurisdictional summons of the defendants is dismissed with costs.

Application allowed.

Solicitors: *Yip Yeo & Nasrim; Allen & Gledhill.*

Reported by *Teoh Ai Lin*

Karunakaran v Wong Yen Choong & Anor

HIGH COURT (KUANTAN) — CIVIL SUIT NO 22-15-87
LAMIN J
12 JANUARY 1990

Civil Procedure — Registrar's certificate — Variation of — Whether court can discharge or vary registrar's certificate eight days after it had been filed — Whether a case of special circumstances within O 44 r 23(2) existed — Rules of the High Court 1980, O 44 r 23(2)

The plaintiff was the registered owner of certain lands in Pahang, Malaysia. The defendants occupy an adjoining plot of land that encroached on part of the plaintiff's land. The defendants had been undisturbed in their occupation for more than 20 years since 1962/1963. The plaintiff bought his land in March 1984 to make a 'quick profit' as the price was cheap. A firm offer of $12.50 per sq ft was made by another party for the plaintiff's land which the plaintiff accepted. After a week, the prospective purchaser told the plaintiff he was not proceeding with the purchase as the defendant's house encroached on the land. Only then did the plaintiff become aware of the defendant's encroachment. The first defendant was not aware of the encroachment until the suit was commenced. The plaintiff commenced an action by way of summons-in-chambers and sought an order for the demolition of the defendants' premises in the encroached area.

The plaintiff was granted his order as prayed by the registrar and awarded the sum of $65,328 for loss of bargain and costs of $3,000. Interest was subsequently allowed at 8% pa from the date the plaintiff received the offer of purchase and this date was later changed on the draft registrar's certificate to the date of filing of the writ and statement of claim. The defendants appealed against the registrar's decision by filing a notice of appeal to the judge-in-chambers and this was dismissed on procedural grounds. The defendants then filed an application by way of summons-in-chambers to discharge/vary the registrar's certificate under O 44 r 23(3).

Held, allowing the defendants' application:

(1) The defendants are not precluded from making the present application under O 44 r 23 under the res judicata rule after their appeal had been dismissed on procedural grounds. The general rule of res judicata cannot succeed as a defence as there had not been a decision on the merits. The process under O 44 r 23(3) was available to the defendants.

(2) Although the registrar's certificate becomes binding after eight clear days, the court has a discretion to entertain an application to hear the same issue provided 'special circumstances' could be shown. In this case, the registrar's award was improper and illegal and, together with the interest as levied and the costs as ordered, had caused a miscarriage of justice for the following reasons:

(a) a wrong principle of law in making the award had been applied and the award was grossly wrong in law. The 'loss of bargain' rule for the assessment of damages should not have been applied in the present case as the defendants were not parties to any contract of sale affecting the plaintiff's land and there was no question of a breach of any contract of sale between them. Neither could the 'letting value' rule be applied as there was no evidence of letting of that portion of the land encroached on and the facts of the case did not justify such a claim;